

Malani L. Kotchka
Nevada Bar No. 283
mkotchka@lionelsawyer.com
LIONEL SAWYER & COLLINS
300 South 4th Street, Suite 1700
Las Vegas, NV 89101
Telephone: (702) 383-8888
Facsimile: (702) 383-8845

Esra A. Hudson (Pro Hac Vice)
California Bar No. 202881
ehudson@manatt.com
Justin C. Johnson (Pro Hac Vice)
California Bar No. 252175
jjohnson@manatt.com
MANATT, PHELPS AND PHILLIPS, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90064
Telephone: (310) 312-4381
Facsimile: (310) 914-5744

Attorneys for Defendant
CASHCALL, INC.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KYLE ZABELNY, an individual AND ON
BEHALF OF ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs,

vs.

CASHCALL, INC., a foreign corporation,
DOES I through X; and ROE Corporations I
through X, inclusive,

Defendants.

Case No. 2:13-cv-00853-GMN-PAL

**DEFENDANT'S REQUEST TO FILE
A RESPONSE TO PLAINTIFF'S SUR-
REPLY IN SUPPORT OF ITS
MOTION TO COMPEL
ARBITRATION; PROPOSED ORDER
THEREON**

1 On June 24, 2013, Defendant CashCall, Inc. (“CashCall”) filed a Notice of New
2 Authority attaching the opinion in *American Express Co. v. Italian Colors Restaurant*, 2013 U.S.
3 LEXIS 4700 (“*American Express*”) (Doc 24), which was issued after the briefing was completed
4 on CashCall’s Motion to Compel Arbitration (Doc 6). In two paragraphs, the Notice of New
5 Authority simply recited the holding in *American Express* without any argument or application
6 to the facts of this case. On July 12, 2013, the Court granted Plaintiff’s request to file a Sur-
7 Reply to address the *American Express* case. (Doc 30). On July 23, 2013, Plaintiff filed his
8 five-page Sur-Reply. (Doc 31.) By this motion, CashCall respectfully requests leave to file a
9 response to Plaintiff’s Sur-Reply, that will not exceed five pages, within five days of any Court
10 order granting such leave.

11 Such leave is appropriate in the interest of fairness, and pursuant to local rules that afford
12 the moving party the right to submit the final briefing on motions. Specifically, CashCall has not
13 yet had the opportunity to address *American Express*’s implications to the facts of this case.
14 Rather, CashCall merely filed the Notice of New Authority that did not contain any argument or
15 analysis. CashCall intentionally filed a non-argumentative notice out of fairness and in an
16 attempt to foreclose further briefing. However, now that Plaintiff has been afforded the
17 opportunity to address the implications of this new authority to the circumstances of this case,
18 CashCall should be afforded the like opportunity.

19 Such a result comports with Local Rule 7-2, which affords the moving party the
20 opportunity to submit the final briefing on a motion. Authorizing CashCall to file a brief
21 response to Plaintiff’s Sur-Reply will restore the briefing order contemplated by Local Rule 7-2.

22 In addition, Plaintiff has expanded the opportunity granted by the Court to file a Sur-
23 Reply for the limited purpose of addressing *American Express*, to argue separate and distinct
24 points based on new authority that neither party had previously cited. For example, in a *non-*
25 *sequitur* to distinguishing *American Express*, Plaintiff devotes a substantial portion of the Sur-
26 Reply to reargue that the FLSA creates non-waivable statutory rights, and cites numerous cases
27 that Plaintiff did not previously cite in his Opposition brief to support this argument. *See* Doc 31
28 at 3:24-5:7. Permitting Plaintiff to interject new argument and authority in support of his

1 Opposition under the guise of a Sur-Reply that was granted for the narrow purpose of permitting
2 Plaintiff to address the *American Express* case, when such authority was available when Plaintiff
3 filed his Opposition, would afford Plaintiff an undue advantage to CashCall's prejudice.

4 For all of the foregoing reasons, CashCall respectfully requests the opportunity to file a
5 brief response to Plaintiff's Sur-Reply. If the Court grants such relief, CashCall will file its
6 response, not to exceed five pages, within five days of the Court's order.

7
8 Respectfully submitted,

9 LIONEL SAWYER & COLLINS

10 By: /s/ Malani L. Kotchka
11 Malani L. Kotchka
12 300 South Fourth Street, Suite 1700
Las Vegas, Nevada 89101

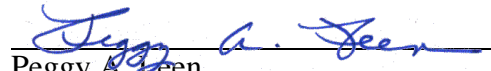
13 Esra A. Hudson
14 Justin C. Johnson
15 MANATT, PHELPS AND PHILLIPS, LLP
16 11355 West Olympic Boulevard
Los Angeles, CA 80064

Attorneys for Defendant

17 **ORDER**

18 **IT IS SO ORDERED** that Defendant's Motion to File a Response to Plaintiff's Sur-
19 Reply (Dkt. #33) is **GRANTED**.

20 Dated this 47th day of July, 2013.

21 
22 Peggy A. Green
United States Magistrate Judge

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